

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Brown and Drake Bay City LLC d/b/a Hereford & Hops Restaurant and Brew Pub and Linda M. Lukowski. Case 7–CA–46016

June 25, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND WALSH

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge and an amended charge filed by Linda M. Lukowski on March 13, 2003, and May 23, 2003, respectively, the General Counsel issued the original complaint on May 28, 2003, against Brown and Drake Bay City LLC d/b/a Hereford & Hops Restaurant and Brew Pub, the Respondent, alleging that it has violated Section 8(a)(1) of the Act.

Thereafter, on August 26, 2003, the Respondent entered into a settlement agreement, which was approved by Administrative Law Judge Mark D. Rubin on September 5, 2003. The settlement required the Respondent to: (1) make whole employee Linda M. Lukowski and employee Lakeshia Washington by payment to each of them of \$5000 in six installments to be remitted to Region 7; and (2) post a notice to employees regarding the complaint allegations. The agreement also contained the following further provisions:

The Charged Party [Respondent] agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, including but not limited to, failure to make timely installment payments of moneys, and after 15 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director shall reissue the complaint previously filed in the instant cases. Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the just issued complaint concerning the violations alleged therein. The Charged Party understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings, conclusions of law, and an order on the allegations of the aforementioned complaint. On receipt of said motion for summary judgment the Board shall issue an Order requiring the Charged Party to

Show Cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party defaulted upon the terms of this settlement agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an Order providing full remedy for the violations found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement. The parties further agree that the Board Order and a U.S. Court of Appeals Judgment may be entered herein ex parte.

By letter dated March 5, 2004, the Regional Director of Region 7 advised the Respondent that the Region had not received the February 20, 2004 installment payments due to Lukowski and Washington, and that if those payments were not received by March 22, 2004, the Regional Director would reissue the complaint and file a motion for summary judgment, as provided for in the settlement agreement.

The Respondent has not complied with the terms set forth in the Regional Director's March 5, 2004 letter. Therefore, on April 1, 2004, the Regional Director reissued the complaint. The Respondent has not filed an answer to the reissued complaint.

On April 12, 2004, the General Counsel filed a Motion for Summary Judgment with the Board. The General Counsel submits that the Respondent defaulted on the settlement agreement by failing to make the required payments, and that the allegations of the reissued complaint should, therefore, be deemed admitted as true. On April 16, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the General Counsel's Motion for Summary Judgment, the Respondent has failed to comply with the settlement agreement approved by the administrative law judge on September 5, 2003, by failing to remit the agreed-upon backpay amounts due employees Lukowski and Washington. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above,

we find that all of the allegations of the complaint are true.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Bay City, Michigan (the Respondent's Bay City facility), has been engaged in business as a restaurant serving food and beverage to the public.

During the 12-month period preceding reissuance of the complaint, in conducting its business operations described above, the Respondent derived gross revenues in excess of \$500,000, and purchased and received at its Bay City facility liquor and goods valued in excess of \$10,000 directly from points outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

John Filary	General Manager
David Southworth	Assistant Manager
Mark Dexter	Assistant Manager
	until about March 2003

At all material times, the Respondent has promulgated and maintained in an employee manual entitled "Standard of Conduct," which it has issued to employees, the following rules applicable to all employees, violation of which may result in separation from employment:

7. No solicitation or posting of solicitations of our employees or guests is permitted.
8. The privacy of our guests and your fellow employees while of [sic] the premises must be respected at all times.

At all material times the Respondent has promulgated and maintained in an employee manual entitled "Tipped Employees' Responsibilities", which it has issued to employees, the following rules:

6. NEVER discuss tips received with anyone on premises. Your gratuities as well as your pay-check are private and personal issues. This includes asking your co-servers about their tips; it is considered inappropriate. When a server checks out at the end of his/her shift with the manager or at the computer allow this co-server his/her privacy.
7. If you do not receive a tip from a customer, or feel that the tip you did receive was inappropriate, you must never discuss it with anyone on premise.

At all material times, the Respondent has promulgated and maintained overly broad no-solicitation and confidentiality rules.

At various times since about late December 2002, the Respondent's employees, including Linda M. Lukowski and Lakeshia Washington, concertedly complained to the Respondent regarding wages, hours, and working conditions of employees by attempting to have the Respondent change its tipping policy.

About January 13, 2003, the Respondent, by its agent John Filary, discharged Lukowski and Washington because they engaged in protected concerted activities and because they violated the Respondent's work rules set forth above.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has thereby engaged in unfair labor practices that affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(1) by promulgating and maintaining overbroad no-solicitation and confidentiality rules, and rules prohibiting the discussion of employees' tips, we shall order the Respondent to rescind those rules, remove them from its employee manual, and advise employees in writing that the rules are no longer being maintained.

In addition, having found that the Respondent has violated the Act by discharging employees Linda M. Lukowski and Lakeshia Washington, we shall order the Respondent to make Lukowski and Washington whole

for any loss of earnings and other benefits suffered as a result of the discrimination against them. In this regard, the Respondent agreed in the settlement agreement that it would pay Lukowski and Washington a total of \$5000 to cover the period from their discharge until the effective date of the settlement agreement. The General Counsel's motion states that there is an outstanding balance in the amount of \$3650 owed to each of the discriminatees. Accordingly, the Respondent shall remit \$7300 to the Region for payment to the discriminatees.

We find, however, that the backpay due Lukowski and Washington should not be limited to this amount. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could issue an Order "providing full remedy for the violations found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement." Thus, under this language, it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expungement of the Respondent's personnel records, and notice posting.¹

The additional backpay due Lukowski and Washington shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). However, because we shall order the Respondent to pay the liquidated remedy specified in the settlement agreement, the applicable backpay periods will commence on September 5, 2003, the day the administrative law judge approved the settlement agreement. We find it necessary to impose this limitation to prevent an unintended double recovery for the periods running from the date that Lukowski and Washington were discharged to the effective date of the settlement agreement.

We shall also order the Respondent to offer Lukowski and Washington full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

In addition, the Respondent shall be required to expunge from its files any and all references to the unlawful discharges of Lukowski and Washington, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

¹ The General Counsel has requested, in his Motion for Summary Judgment, that the Board order "the payment of \$3,650.00 to the Charging Party and for payment of \$3,650.00 to discriminatee Lakeshia Washington in liquidated damages, and such other relief deemed appropriate and necessary by the Board."

ORDER

The National Labor Relations Board orders that the Respondent, Brown and Drake Bay City LLC d/b/a Hereford & Hops Restaurant and Brew Pub, Bay City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overbroad no-solicitation rule.

(b) Promulgating and maintaining an overbroad confidentiality rule prohibiting employees from discussing their wages and working conditions.

(c) Promulgating and maintaining a rule prohibiting employees from discussing their tips anywhere on the premises.

(d) Discharging or otherwise discriminating against employees for violating unlawful rules or because they engage in concerted activity protected by the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in 1(a) through (c) above, remove them from its employee handbooks, and advise employees in writing that the rules are no longer being maintained.

(b) Within 14 days from the date of this Order, offer Linda M. Lukowski and Lakeshia Washington full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Pay to Region 7 \$7300 to be disbursed to Linda M. Lukowski and Lakeshia Washington in accordance with the September 5, 2003 settlement agreement, and make them whole for any loss of earnings and other benefits suffered since September 5, 2003, as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges of Lukowski and Washington, and within 3 days thereafter, notify them in writing that this has been done, and that the unlawful discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an elec-

tronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bay City, Michigan, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 25, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain an overbroad confidentiality rule prohibiting employees from discussing wages and working conditions.

WE WILL NOT promulgate or maintain a rule prohibiting employees from discussing their tips anywhere on the premises.

WE WILL NOT discharge or otherwise discriminate against employees for violating unlawful rules or because they engage in concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT promulgate or maintain an overbroad no-solicitation rule.

WE WILL rescind the rules noted above, remove them from our employee handbooks, and advise employees in writing that the rules are no longer being maintained.

WE WILL, within 14 days from the date of the Board's Order, offer Linda M. Lukowski and Lakeshia Washington full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL pay to Region 7 \$7300 to be disbursed to Lukowski and Washington in accordance with the September 5, 2003 settlement agreement, and make them whole for any loss of earnings and other benefits suffered since September 5, 2003, as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharges of Lukowski and Washington, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful discharges will not be used against them in any way.

BROWN AND DRAKE BAY CITY LLC D/B/A
HEREFORD & HOPS RESTAURANT AND BREW
PUB